LIBRARY
SUPREME COURT, U. S.
JUN 6 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 164

IRVEN LEE DAWKINS and CAROL W. THOMAS,

Petitioners,

—VS.—

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

MURRAY A. GORDON
401 Broadway
New York, New York

JEROME J. BORNSTEIN
125 S. Court Avenue
Orlando, Florida

Attorneys for Petitioners

INDEX

	PAGE
Opinions Below	2
Jurisdictional Grounds	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	4
REASONS FOR GRANTING THE WRIT	
I. The convictions were in violation of the First Amendment	16
II. The convictions were unconstitutional under the due process clause of the Fourteenth Amendment	24
III. It was violative of due process for the Florida appellate courts to sustain the convictions here on the basis of evidence adduced after the convictions	26
CONCLUSION	27
APPENDIX	
Opinion of the District Court of Appeal of Florida, First District	29
Judgment and Sentence	38
Order Dismissing Appeal	40
Order Denying Certiorari	41

Table of Authorities

PAGE

Cases:

Bloom v. Illinois, 36 U. S. L. W. 4429 17
Bridges v. California, 314 U. S. 252 ..... 16, 17, 18, 20, 21, 22

Chessman v. Teets, 356 U. S. 156 27
Cole v. Arkansas, 333 U. S. 196 24
Craig v. Harney, 331 U. S. 367 ..... 17, 20, 21, 22
Craig v. Hecht, 263 U. S. 255 ..... 17, 22

De Jonge v. Oregon, 299 U. S. 353 24
Dombrowski v. Pfister, 380 U. S. 479 18

Garner v. Louisiana, 368 U. S. 157 25

New York Times Co. v. Sullivan, 376 U. S. 254 20
Nye v. United States, 313 U. S. 33 17

Pennekamp v. Florida, 328 U. S. 331 ..... 16, 17, 21, 23

Shuttlesworth v. Birmingham, 382 U. S. 87 25

Taylor v. Louisiana, 370 U. S. 154 25
Thompson v. City of Louisville, 362 U. S. 199 25
Toledo Newspaper Co. v. United States, 247 U. S. 402 .. 20

Wood v. Georgia, 370 U. S. 375 ..... 17, 18, 19, 21

Younghans v. State, 90 So. 2d 308 9

United States Constitution:

First Amendment 2, 3, 16, 18, 21, 23
Fourteenth Amendment 2, 13, 16, 24

PAGE

Statutes and Rules:

28 U.S.C. §1257(3) 2

28 U.S.C. §2101(e) 2

Rules of the United States Supreme Court:

Rule 19(1)(a) 2

Rule 22(1) 2

Miscellaneous:

De Mott, "The Age of Overkill", The New York Times Magazine, May 19, 1968, p. 104 20

The Report of the President's National Advisory Commission on Civil Disorders 20-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

IRVEN LEE DAWKINS and CAROL W. THOMAS,

Petitioners,

—VS.—

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Irven Lee Dawkins and Carol W. Thomas, respectfully pray for a writ of certiorari to the District Court of Appeal of Florida, First District, to review the decision of that Court affirming a judgment and sentence by the Circuit Court of Florida, Eighth Judicial District, Alachua County, adjudging the petitioners guilty of contempt and imposing sentences of six months and four months, respectively, on petitioners, and for a writ of certiorari to the Supreme Court of Florida to review the orders of that Court dismissing petitioners' appeal from the aforesaid decision of the aforesaid District Court and denying petitioners' application for a writ of certiorari.

Opinions Below

The opinion of the District Court of Appeal of Florida, First District, is reported as *Dawkins, et al.* v. *State of Florida,* at 208 So. 2d 119, and is set out in the Appendix, *infra,* pp. 29-37.

Jurisdictional Grounds

The opinion of the District Court of Appeal of Florida, First District, is dated and filed March 7, 1968 (R-94)[1] and the order of that court is dated and filed May 14, 1968 (R-108). The order of the Florida Supreme Court dismissing the appeal is dated and filed April 17, 1968 (RFS-1), and the order of that court denying the petition for a writ of certiorari is dated and filed April 23, 1968 (RFS-2).

The jurisdiction of this Court is invoked pursuant to 28 USC 1257 (3); 28 USC 2101 (e); and Rules 19(1)(a) and 22(1) of the Rules of the United States Supreme Court.

Questions Presented

Whether contempt convictions of the petitioners for the publication and dissemination of an article which dealt with a pending state Grand Jury investigation and which was read by members of that Grand Jury:

(1) violated the First Amendment, as incorporated by the Fourteenth Amendment, where there was no sufficient showing of a clear and present danger that the article

[1] The letter "R" refers to the records transmitted from the District Court of Appeal, First District of Florida. The letters "RFS" refer to the record transmitted from the Supreme Court of Florida.

would or did obstruct, impede, or interfere with the work of the Grand Jury;

(2) violated the Due Process Clause of the Fourteenth Amendment where the charges were that the article held the Circuit Court and Grand Jury of Alachua County, Florida, up to ridicule and impugned the impartiality of that Court and Grand Jury, but the convictions were based upon alleged intentional interference with the work of the Grand Jurors resulting from their reading of the publication;

(3) violated the Due Process Clause of the Fourteenth Amendment where there was no evidence that either of the petitioners had disseminated the article or caused the article to be disseminated to any member of the Grand Jury; or

(4) violated the Due Process Clause of the Fourteenth Amendment where the conviction was sustained on appeal on the basis of testimony adduced at a post-conviction hearing held for the purpose of determining the propriety of denying bail pending appeal.

Constitutional Provisions Involved

1. United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case

In 1967 the petitioners complained publicly that Negro female inmates of the Gainesville, Florida, City Jail were being sexually molested by certain officials. The Alachua County, Florida, Grand Jury was reconvened on December 11, 1967 to investigate these charges. The contempt conviction here under review resulted from the writing and dissemination of an article dealing with those Grand Jury proceedings.

The contempt proceedings were commenced on December 18, 1967 by the petitions of the State Attorney of the Eighth Judicial Circuit of Florida, Alachua County, addressed to the Circuit Court for that Circuit (R-3, 5). Irven Lee Dawkins and Carol W. Thomas (herein sometimes referred to as "the petitioners") are charged with being the author and co-author, respectively,[2] and with disseminating or causing to be disseminated "in this community" a publication entitled "Black Voices" which "held this Court and Grand Jury system up to ridicule" and "impugned the impartiality of this Court and the present Grand Jury" (R-3, 5). The following language from that publication is quoted in the petitions:

> "The so-called authorities of Gainesville are at their old trick again. They have called together a Grand-Jury to investigate charges made by Black people against that racist, Klan-infested police department. Well, gather round, let me tell you this; that Grand-Jury is just as racist and Klan infested as the police de-

[2] The text of the publication lists Dawkins as the author (see (R-91), attached publication), but the parties have stipulated Mrs. Thomas as co-author (R-18).

partment is. I told you before that when they got through lying, fixing, framing, and denying—*nothing* was going to be done! Look who's sitting on the jury. What they will probably do is put in a couple of Uncle Toms to make their findings justifiable. If there are any Uncle Toms on that Grand-Jury, we all know who they will be.

By them housing female prisoners in the County jail is not going to solve the issue; just one of them. In the meantime that sadist Wildersān gets off scott-free. And Ted Duncan—I don't have to tell you about that negro-hating hunkie, I think you already know. And ex-mayor McKinney—he's worse. A lying, no-good, racist if I ever saw one. He reminds me of 'Bull' Conner.

There are people who are going to be subpoened to come to this fixed Grand-Jury, including myself. Many people are afraid to go—which shows WHITE POWER again. WE ARE ASKING THAT EVERYONE IN GAINESVILLE WHO IS MAN AND WOMAN ENOUGH TO STAND UP AND FIGHT AGAINST THIS OPPRESSIVE CITY AND COUNTY GOVERNMENT COME FORWARD AND TESTIFY ON MONDAY, DEC. 18 AT 9:30 A. M. By the way, where are those so-called negro-leaders in Gainesville. You know these things have been going on, but you are afraid to stand up. So stay in your chairs, we know you are a part of White oppression" (R-3, 4).

No evidence in support of the petitions was cited other than the quoted language.

By Orders to Show Cause dated December 19 and 20, 1967, Circuit Judge James C. Adkins, Jr., directed the

Alachua County Sheriff to take petitioners into custody and to produce them on the December 27 return date, then to show cause why they should not be adjudged in contempt, and conditioned release on $1,500 bond in the case of Mr. Dawkins and $500 for Mrs. Thomas (R-7, 9). Motions by petitioners to quash the Orders to Show Cause on the factual, statutory, and state and federal constitutional grounds presented in this petition (R-10, 12) were denied by an order which also consolidated the proceedings (R-14). The petitioners thereupon interposed an answer admitting certain stipulated matters and denying that the article was contumacious of the Court or the Grand Jury (R-15).

In lieu of a trial of the issues thus posed by the pleadings, counsel entered into a stipulation as to "the facts . . . to which witnesses for the State would testify" (R-17). The substance of the stipulation was as follows:

> "1. That a Grand Jury for Alachua County, Florida, was empaneled on the Fall Term of Court on October 9, 1967; that said Grand Jury was composed of five Negroes and thirteen Whites; that the term of said Grand Jury continues until the Spring Term of Court beginning in April, 1968.
>
> 2. That the authors of the publication 'Black Voices', and in particular the portion of said publication quoted in the Affidavit and Petition for Rule to Show Cause, were the Respondents herein.
>
> 3. That on the 11th day of December, 1967, T. E. Duncan, as State Attorney aforesaid, moved the Court to reconvene said Grand Jury and on December 11, 1967, James C. Adkins, Jr., Circuit Judge, entered an Order reconvening said Grand Jury on December 18, 1967, at 9:30 a. m.

4. That said Grand Jury reconvened and went into session beginning at 9:30 a. m. December 18, 1967, in the Court House in Gainesville, Alachua County, Florida.

5. That while said Grand Jury was in session or during a recess of said Grand Jury the respondent, Irven Lee Dawkins, also known as Jack Dawkins, distributed four copies of the publication 'Black Voices', containing the language quoted in the Affidavit and Petition for Rule to Show Cause, to four persons in the hallway adjacent to said Grand Jury room.

6. That in addition to the dissemination or the distribution of the copies mentioned in the preceding paragraph other copies of the publication 'Black Voices', containing the language quoted in the Affidavit and Petition for Rule to Show Cause, were distributed by the Respondents elsewhere in the City of Gainesville.

7. It is further stipulated by and between counsel for the respective parties that a copy of the entire publication 'Black Voices' herein referred to is attached to this Stipulation and made a part hereof." (R-17, 18).

Based on the foregoing record, and without any other or further proceedings, on December 27, 1967 Circuit Judge Adkins found both petitioners guilty of contempt and forthwith sentenced petitioners to the County Jail of Alachua County for six months and four months respectively (R-19). In his supporting opinion, Circuit Judge Adkins stated:

"I consider this publication in itself to be a calculated effort on the part of the respondent to interfere with

the fair administration of justice, and this being so it would not be necessary to show that it did actually influence the grand jury in any report which may be made." (R-20)

• • • • •

". . . the publication was distributed in the court house and from that it may easily follow that this publication was accessible to witnesses who were to appear before the grand jury, with the possibility of influencing the testimony to be given and also the possibility or natural inference that the publication may come into the hands of a member of the grand jury." (R-21)

• • • • •

". . . the reference in the publication that 'if there are any Uncle Toms on that grand jury we all know who they will be' constitutes a veiled threat to the members of the grand jury who are of the colored race." (R-21)

• • • • •

". . . the reference to a 'racist and Klan-infested grand jury' would tend to antagonize members of the grand jury." (R-22)

Petitioners appealed immediately to the District Court of Appeal, First District, of Florida (R-26), assigning as error that the action of the Circuit Judge was contrary to the evidence and the law (R-28). Simultaneously petitioners instituted proceedings for bail pending appeal. These bail proceedings are not part of the record here, but we shall review them briefly because they resulted in a significant expansion, during the pendency of the foregoing appeal, of the record before this Court.

Circuit Judge Adkins, while expressly acknowledging "that the denial of the motion may result in the completion of the sentence prior to disposition of appeal", denied bail by order dated December 27. The motion by petitioners to the Florida District Court of Appeal, First District, to review denial of bail pending appeal was refused by order of that court, filed on January 10, 1968, after a discussion on the merits wherein it was concluded that the appeal did not meet the Florida test of raising "grounds not frivolous but fairly debatable" (*Younghans* v. *State,* 90 So. 2d 308). Petitioners thereupon applied for habeas corpus to the United States District Court for the Northern District of Florida and, by its order of January 15, 1968, that court denied the application without prejudice, and found that any delay beyond five days by an appropriate state court in releasing petitioners after application to such court by petitioners "will render state corrective process ineffective to protect the rights of such petitioners" and would be the occasion for a hearing on the merits by the United States District Court. On January 16, 1968 the Florida Supreme Court denied petitioners' application for a writ of habeas corpus, one judge dissenting, and on that same day petitioners prayed for a hearing on the merits before the United States District Court. On January 17, 1968 Chief United States District Judge Carswell disposed of this motion (R-92A) by directing a hearing before the Circuit Court for Alachua County, Florida, "for establishment on the record of such facts as there may be . . . to support the order of that Court denying these petitioners bail pending appeal" (R-92C), setting January 22, 1968 as the outside date for the transcribing and filing of the record of such hearing, and fixing bail at $500 if the foregoing conditions were not met.

On January 19, 1968, commencing 4:00 P.M. and ending 6:45 P.M., the directed hearing was held before Circuit Judge Adkins (R-32). In part, that hearing dealt with conventional bail matters, *i.e.*, the character and reputation of petitioners and the likelihood of their compliance with directions of the court. But in major part the hearing dealt, over objections by petitioners' counsel (R-39, 50, 61, 66, 67, 73, 78, 79), with the issue whether the publication and dissemination of the article in question had interfered with or impaired the Grand Jury proceedings. The State moved to amend the record in the pending state court appeal to include the latter testimony bearing on the merits of the charged contempt (R-30), and that motion was granted (R-93).

Petitioners here contend that it is improper to appraise the correctness of the original judgment of, and sentence for, contempt on the basis of testimony adduced after the rendition of such judgment and sentence. For the sake of completeness, however, we shall review the January 19th evidence.

The foreman of the Grand Jury involved testified that on December 18, 1967 the Grand Jury was investigating complaints made to the Gainesville City Commission by the petitioners (R-40, 41). At that time the "Black Voices" publication "came to" his attention during a midmorning recess (R-41).

> ". . . I saw one of the Grand Jurors with it. During that time, we kept passing it around among ourselves. I did not see it come into the courtroom. I don't know how it got in here." (R-41)

When asked for his "immediate reaction" to the article, the foreman testified:

"A. I was startled, because it intimidated me. I felt it was a threat to me as a Grand Juror, when we had hardly even opened the session. It frightened me, frankly.

Q. Did you, Mr. Mitchell, consider whether or not it was an attempt upon you as a Grand Juror to force you to reach some findings or decision whether or not there was any evidence to support it?

Mr. Bornstein: Your Honor, I object. That is a leading question.

The Court: I will overrule the objection.

A. Yes." (R-42, 43)

* * * * *

"Q. Mr. Mitchell, did you feel that the publication had any effect upon your ability to make an unbiased determination of the issues that were to be determined by you?

Mr. Russ: He is leading the witness, Judge. He is asking his witness what his impressions were.

The Court: Your objection is because it is leading?

Mr. Russ: Yes, sir.

The Court: I will overrule the objection.

Mr. Duncan: Please read the question.

(Thereupon, the question was read by the Court Reporter.)

Mr. Russ: I further object, Your Honor. Again, he is referring to a mental process.

The Court: The objection is overruled.

A. Yes, sir; it did.

Q. Can you explain how? A. Well,—

The Court: Go ahead.

A. The details of which I cannot reveal because of the Oath that I took as a Grand Juror, it affected the deliberations—

Mr. Russ: Your Honor, I object to this as being a pure conclusion on the part of this man. He can speak for himself, but surely he can't speak for the other 17 members of the Grand Jury.

The Court: I am going to sustain the objection to that.

A. It affected me. It affected the way in which I operated as a Grand Juror throughout the entire case. It affected the final Presentment, as far as I was concerned, and the Presentment which I voted for." (R-45-46)

On cross-examination the foreman of the Grand Jury acknowledged that the Grand Jury had, as the "Black Voices" article predicted, found as "not true" the charges by the petitioners of the sexual molestation of Negro women prisoners by jail officials (R-47).

The balance of the testimony as to the alleged contempt was from six other members of the Grand Jury and similar in import to that of the foreman. None testified how the publication had come into the possession of the Grand Jury and none testified that he received the publication directly or indirectly from either petitioner (R-51-52, 62, 67, 74). The effects of the reading of the article were described by these witnesses as follows:

"A. It upset me when I first read it, and to feel like that here I was, a Grand Jury member not known, or not knowing, the witnesses—

Mr. Russ: Your Honor, I will object to the answer to the question, 'It upset me.'

The Court: The objection is overruled.

A. Well, first, they didn't know me, and yet they were accusing me first of being a liar and of being fixed." (R-53-54)[3]

* * * * *

"A. . . . I recall reading this and I read it the second time because I didn't like the tone of it at all. And after reading it the second time, I felt that this was an insult to me, personally, and that I had never met Mr. Dawkins or Mrs. Thomas to my knowledge and I didn't feel that they had ever met me, and yet they were saying things about me that I resented. And I took this more or less as a threat that I should try and find things in their favor in regards to the hearing even to the extent that the evidence would be there or would not be there. I did my best to try and judge the hearing without trying to consider this, but I know it was always on my mind." (R-62-63)

* * * * *

"A. Well, it concerned me somewhat and it is difficult to really figure out what was trying to be accomplished. I felt like to some extent I was being put on notice. I didn't know who the writer was and I don't know if the

[3] When this witness was asked how publication had affected his deliberations, he refused to answer, saying:

"A. I feel I would be violating my Oath as a Grand Juror.
Q. Haven't you done that already, sir? A. No, I haven't." (R-59)

writer knew me, so some of the charges made in there I couldn't understand the foundation for the charges. But I was concerned about it." (R-67)[4]

• • • • •

". . . it seemed like to me it was a small way of threat. Of course, I didn't pay too much attention to it. I don't know how much effect it taken. That's just the way I felt about it at the time." (R-74)

• • • • •

"Well, sir, at best it had an effect to where the findings that I came to as a member of the Grand Jury would not be acceptable to the people involved and the people named there; that no matter how long it took us to make our findings it wouldn't be satisfactory. It caused anger for me, as a result—to me, personally. And it caused me to reflect very long on the wording of the final statement made by the Grand Jury.

---

[4] On cross-examination this witness further testified:

"Q. You said that it would force you—you thought it might force you to make findings that were contrary to the evidence. A. No, I didn't say that. I said that it would make me believe that what we did come up with if it happened to be contrary to the authors' opinions then I would be characterized as such men.

Q. As what? A. Klan-infested, lying, member of the Klan, lying. There was another term in there—I'm just trying to think what it was." (R-70)

"Q. There was nothing in this article in that flier that in any way changed your evaluation of the evidence, was there? A. There was a little bit of concern, myself, as to the wording of the charges." (R-71)

"Q. Let me rephrase the question. The question is: isn't it true that when you reached your findings as contained in the Presentment that this flier in no way affected what your findings were? You didn't violate your Oath as a Juror in seeking the truth based upon this flier, did you? A. I don't believe so." (R-71)

Q. Can you state whether or not you considered that a threat or an intimidation to cause you to make a finding regardless of the evidence?

Mr. Russ: Objected to as leading.

The Court: Objection overruled.

A. State the question again.

Mr. Duncan: Please read him the question.

Q. (Question read by reporter) A. No, sir." (R-79, 80)

• • • • •

"... it was an insult to me, as well as a kind of veiled threat that if we did not find to suit them that they knew who we were and implied that things may happen." (R-86)

All admitted that the publication did not deter the Grand Jury from concluding, in its presentment, that the charges being investigated were not substantiated[5] (R-58, 65, 71, 76, 87).

On March 7, 1968 the District Court of Appeal First District, State of Florida, affirmed the contempt conviction of petitioners (R-94; App. *infra*, pp. 38-39). That court's opinion relied heavily upon the described testimony at the January 19th hearing (R-98-100, 101; App., *infra*, pp. 29-37) and concluded that a showing had been made of a clear and present danger of interference with the Grand Jury suffi-

[5] The transcript of the described hearing was remitted to the United States District Court which denied habeas corpus on January 24, 1968 after reviewing the record, but on February 6, 1968 the United States Court of Appeals for the Fifth Circuit granted $1,000 bail pending appeal from the habeas corpus denial.

cient to overcome the petitioners' First Amendment rights to write and distribute the publication involved.*

Petitioners sought review in the Florida Supreme Court by way of appeal (R-104) and certiorari (RFS-2). Petitioners assigned as error the order supplementing the record to include the January 19th hearing and the order of affirmance by the Florida District Court of Appeals, First District, as contrary to the evidence and to the law (R-105). The Florida Supreme Court dismissed the appeal on April 15, 1968 (RFS-1; App., *infra*, p. 40) and denied certiorari on April 23, 1968 (RFS-2; App., *infra*, p. 41).

REASONS FOR GRANTING THE WRIT

I.

The convictions were in violation of the First Amendment.

Where, as here, a publication and its dissemination are charged as in contempt of a pending state judicial proceeding, the prohibitions of the First Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, are applicable. *Bridges* v. *California*, 314 U. S. 252 (hereinafter referred to as *"Bridges"*); *Pennekamp* v. *Florida*, 328 U. S. 331 (hereinafter referred to as *"Penne-*

* On April 12, 1968, following the described affirmance by the Florida District Court of Appeal, the United States Court of Appeals for the Fifth Circuit held that the petitioners' "appeal to the Florida appellate courts was not so lacking in merit or frivolous as to warrant denial of bail pending appeal", and, accordingly, reversed the United States District Court's order denying habeas corpus and granted $1,000 bail for each petitioner pending exhaustion of "such remedies and appellate procedures as are available" to petitioners.

kamp"); *Craig* v. *Harney*, 331 U. S. 367 (hereinafter referred to as "*Harney*"). In such circumstances conviction for contempt cannot be justified merely by a showing of "a tendency to prevent and obstruct the discharge of judicial duty". See *Nye* v. *United States*, 313 U. S. 33, 47-52; *Craig* v. *Hecht*, 263 U. S. 255, 277; *Bloom* v. *Illinois*, 36 U. S. L. W. 4429, 4432. Instead there is required a "solidity of evidence" (*Pennekamp*, at 347-348) that, pursuant to the clear and present danger test, "the substantive evil of obstruction or interference must be extremely serious and the degree of imminence extremely high before utterances can be punished" (*Bridges*, at 263; see also *Pennekamp*, at 334; *Harney*, at 371-373). And it is well settled that the ultimate issue whether an utterance does "carry a threat of clear and present danger to the impartiality and good order of the courts" must be independently determined by this Court. *Pennekamp*, at 335; *Harney*, at 373-374; *Wood* v. *Georgia*, 370 U. S. 375, 386 (hereinafter referred to as "*Wood*").

Each of the principles cited is applicable where the judicial proceeding involved is that of a Grand Jury investigation. *Wood*, at 389-393. Chief Justice Warren has observed:

> "Particularly in matters of local political corruption and investigation it is important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot operate in a vacuum." *Wood*, at 390.

> "When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular individual, society's interest is best served by a thorough and extensive

investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion. Consistent suppression of discussion likely to affect pending investigations would mean that some continuing public grievances could never be discussed at all, or at least not at the moment when public discussion is most needed." *Wood,* at 392.

The "chilling effect" doctrine of *Dombrowski* v. *Pfister,* 380 U. S. 479, has particular pertinency to discussion said to constitute contempt of a Grand Jury investigation, as here, into a timely and controversial matter of general and political concern. Such discussion, normally subsumed under the First Amendment, will subside precisely to the extent it runs the risk of criminality. *Wood,* at 392. And, as compared with the dampening effect of a statute with fixed and definite proscriptions, discussion of a pending Grand Jury investigation is carried on at the peril that any language may be found by a judge as obstructive of justice unless the full safeguards of the First Amendment are extended to such language. *Bridges,* at 269.

Measured by the described standards, the publication here complained of cannot, compatible with the First Amendment, be the basis for convictions for contempt.

We believe that respondent will concede that the publication and dissemination of the article are a form of expression protected by, if they do not exceed the bounds of, the First Amendment. The Alachua County Grand Jury was investigating charges, of lurid police activity, which were matters of public knowledge and interest and, therefore, discussion. The charges were highly inflammatory,

involving as they did police brutality, sexual molestation, and racism, and any resultant discussion was extremely likely to be heated. Petitioners had initiated the charges and could be expected to be participants in such discussion. In the described context, petitioners' rhetoric was more a function of the issue than of their impropriety. If petitioners had any right under the First Amendment to discuss publicly the charges pending before the Grand Jury investigation,—and this Court held such discussion appropriate in *Wood*,—then it was almost unavoidable to do so meaningfully or effectively without impinging upon the sensibilities of some.

The portion of the article complained of consists of three paragraphs. These contain harsh but brief characterizations of the police, the Grand Jury, two named individuals whom the record does not identify, and an ex-Mayor. The police and Grand Jury are both said to be racist, and the authors express their expectation that police duplicity before the Grand Jury will result in no action by the Grand Jury. The article anticipates no independent Negroes but only "Uncle Toms" on the Grand Jury, cites the fear of "many people" to testify, and urges "EVERYONE IN GAINESVILLE WHO IS MAN AND WOMAN ENOUGH TO STAND UP AND FIGHT AGAINST THIS OPPRESSIVE CITY AND COUNTY GOVERNMENT COME FORWARD AND TESTIFY ON MONDAY, DEC. 18 AT 9:30 A.M." Not in any of its parts, nor in its entirety can the article be fairly considered as the kind of impelling document which would create clear and present danger of seriously impeding or influencing a Grand Jury made up of persons who have, presumably, been frequently exposed to the dialogue and action of our times.

We assume that it was not contempt to anticipate correctly, as the article did, that "*nothing* was going to be done" by the Grand Jury. *Cf.* Holmes, J., dissenting in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 422, at 424. We likewise assume that the only call for action contained in the article was not contempt since that call was for men and women to feel free to "come forward and testify".

Nor was it contempt to use "strong language, intemperate language, and * * * an unfair criticism". *Harney,* at 376. For ours is

> ". . . a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."
>
> *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270.

> ". . . it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."
>
> *Bridges;* at 270.

The most offensive aspects of the article are its characterization of the Grand Jury "as racist and Klan infested" and its reference to possible "Uncle Toms on that grand-jury". But verbal "overkill" is part of the current mode of rhetoric. De Mott, "The Age of Overkill", The New York Times Magazine, May 19, 1968, p. 104. The Report of the President's National Advisory Commission on Civil

Disorders talks of "white racism" in describing our urban crisis. In any event, "It is not enough that the judge's sensibilities are affected or that in some way he is brought generally into obloquy". *Pennekamp,* at 372.

Editorials and stories characterizing a judge's action as "arbitrary" and a "travesty on justice" were held not to be contempt in *Harney.* Even more vitriolic editorials, stories, and cartoons charging Florida Circuit Court judges with delays and excessive deference to technicalities on behalf of defendants in pending criminal cases were held protected under the First Amendment in *Pennekamp.* In *Wood* the defendant had charged the judge with a crude attempt to intimidate Negroes and to agitate for Negro votes and followed this with a letter circulated among the Grand Jurors asserting that the judge's instructions to them were false; this Court held these utterances not punishable as contempt because they were within the First Amendment. Underlying the described cases is the understanding that judges and grand jurors must be assumed to be men of reasonable character, firmness, and courage so that even intemperate and abusive extra-courtroom criticism is not likely to obstruct or interfere with them in the performance of their duties. *Bridges,* at 270, 273, 276; *Pennekamp,* at 348; *Harney,* at 375-376; *Wood,* at 382-387. The experience of the Grand Jury here, utterly unresponsive to the petitioners' charges, confirms such an assumption in that the Grand Jurors were plainly not influenced by the petitioners' article.

The article states that

> "If there are any Uncle Toms on that Grand-Jury, we all know who they will be."

As a "veiled threat" this statement is far less menacing than the assertion, which was held not to be contempt in *Bridges,* at 276 ff., that 12,000 union members did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board". Even if the quoted statement of the article created the prospect of future criticism or unpopularity, it is clear that the law of contempt is not made for the protection of those "who may be sensitive to the winds of public opinion". *Harney,* at 376; see also *Bridges,* at 273; Holmes, J., dissenting in *Craig* v. *Hecht, supra,* at 281. And to the extent that the petitioners have articulated rather than threatened likely future public response to Grand Jury inaction, they are not guilty of contempt since if the Grand Jurors were "not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice". *Bridges,* at 276.

The described effect of the language of the article is not rendered criminal by the reactions to that language claimed by some members of the Grand Jury. For reasons discussed below we believe the testimony of the Grand Jurors to be no proper part of the record here (see pp. 26-27 *infra*). In any event, the issue here must be decided in terms of reasonably anticipatible reactions to the article, not in terms of unique or exquisitely sensitive reactions. Comment on pending cases

> "may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage

or stability in the face of criticism which individual judges may possess . . ."

Pennekamp, at 348.

Moreover, the proof at the January 19th hearing falls far short of any firm or solid showing that the article seriously impeded or influenced the work of the Grand Jury. Even with the aid of leading and suggestive questioning, the Grand Jurors claimed little more than that they were "startled" (R-42), "upset" (R-53), subjected to "an insult" (R-63), "concerned" (R-67), exposed to "a small way of threat" (R-74), caused "anger" (R-79), the subject of "a kind of veiled threat" (R-86). But there was, apparently, no delay or other interference caused, and no Grand Juror claimed that his vote or action as a Grand Juror was significantly influenced by the article. Irritation, even anger, is not enough to sustain a conviction for contempt where, as here, the provocation is occasioned by a form of expression guaranteed by the First Amendment.

For the reasons indicated, the convictions here are counter to the First Amendment pursuant to its terms and its construction by this Court. At the least, the convictions raise substantial constitutional questions concerning the permissible scope of First Amendment expression about a pending Grand Jury investigation. In either aspect of the state of the law the petition here prayed for should be allowed.

II.

The convictions were unconstitutional under the due process clause of the Fourteenth Amendment.

The original charges were that an article was disseminated in the "community" by the petitioners which held "up to ridicule" and "impugned the impartiality" of the Circuit Court and Grand Jury (R-3, 5). No obstruction or other interference with the work of the Court or the Grand Jury was charged in the petitions initiating the proceeding. The convictions, however, were based upon the finding that the publication "was calculated and intended to interfere with the administration of justice" by the Grand Jury (R-19, 22), and not upon any finding that the Court or Grand Jury had been subjected to ridicule or had its impartiality impugned. In view of the cases discussed at pp. 16-23 *supra*, any charge of contempt by reason of ridicule or impugnment was obviously constitutionally defective where not accompanied by a charge of obstruction or interference; libel and contempt are, of course, different offenses. And where, as here, a defendant is charged with one offense but convicted of another, due process is violated. *De Jonge* v. *Oregon*, 299 U. S. 353, 362; *Cole* v. *Arkansas*, 333 U. S. 196, 201.

Even if we treat the charges as one of contempt for interference with the work of the Grand Jury, the convictions here are constitutionally void. For the theory on which petitioners were convicted, though not charged, was that the work of the Grand Jury was impeded by reason of the reading of the article by members of the Grand Jury. In this view of the cause for prosecution, the evidence must show not only petitioners' responsibility for

the publication of the article but also for its dissemination to the Grand Jury. Only if petitioners disseminated, or were responsible for disseminating the article to the Grand Jurors can petitioners be guilty for the consequences alleged to have followed upon the reading of the disseminated article. And in this case, unlike other contempt cases involving widely and publicly distributed newspapers, dissemination cannot be inferred from the mere fact of publication.

The petitions initiating the proceedings allege dissemination of the publication by petitioners "in this community", not specifically to the Grand Jury (R-4, 6). None of the Grand Jurors testified that either of the petitioners or anyone acting for or on behalf of either of the petitioners distributed the article to any Grand Juror (see p. 12 *supra*). And the stipulation entered into in lieu of testimony specified only that one of the petitioners, Dawkins, "distributed four copies of the publication . . . to four persons in the hallway adjacent to said Grand Jury room", and that both petitioners had distributed the publication "elsewhere in the City of Gainesville" (R-18). There is, therefore, no evidence that petitioners distributed, or caused or intended copies of the article to be distributed to any Grand Juror. In this respect, too, therefore the convictions are invalid. For convictions thus totally devoid of supporting evidence are violative of due process. *Thompson* v. *City of Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157; *Taylor* v. *Louisiana,* 370 U. S. 154; *Shuttlesworth* v. *Birmingham,* 382 U. S. 87.

III.

It was violative of due process for the Florida appellate courts to sustain the convictions here on the basis of evidence adduced after the convictions.

As indicated in the statement of the case, the record was expanded by the Florida appellate courts to include testimony taken, after the convictions, to determine whether the denial of bail pending appeal was proper (see pp. 9-16 *supra*). In our view serious due process questions are raised, and should be resolved, where post-conviction hearings not addressed to issues of innocence or guilt are then used in subsequent appeals dealing with such issues. Sentencing, sanity, parole and other post-conviction hearings involve procedures, standards and burdens of proof, testimonial involvement by defendants otherwise entitled to the privilege against self-incrimination, and evidence by doctors, psychiatrists, probation officers, social workers, etc., which have no proper place in the prior proceedings for the adjudication of innocence or guilt.

In this case petitioners entered the January 19th hearing on the reasonable assumption that it would deal with their right to bail pending appeal, not a second trial of the issue of contempt. In a real sense, therefore, petitioners were without notice. Even if—indeed, particularly if—such a hearing, absent proper notice or opportunity to defend, resulted in incriminating proof, use of such proof was violative of due process.

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be re-

spected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution." *Chessman* v. *Teets*, 356 U. S. 156, 165.

CONCLUSION

A writ of certiorari to the District Court of Appeal of Florida, First District, and the Supreme Court of Florida should be granted.

Respectfully submitted,

MURRAY A. GORDON
401 Broadway
New York, New York

JEROME J. BORNSTEIN
125 S. Court Avenue
Orlando, Florida

Attorneys for Petitioners

June 1968

APPENDIX

Opinion of the District Court of Appeal of Florida, First District

SPECTOR, *J.*

This is an appeal from an order adjudging the appellants to be in contempt of court for engaging in conduct imminently tending to interfere with the fair and orderly administration of justice. Subsequent to the entry of the Circuit Judge's order, judgment, and sentence, appellants' motion for bail pending appeal was denied and this Court refused to disturb the Trial Judge's denial of bail by our opinion reported at 205 So. 2d 691.

The overt acts upon which the Trial Judge based his contempt order were the physical distribution by the appellants of a crudely mimeographed circular or handbill within the Alachua County Courthouse at a place immediately adjacent to the room wherein the grand jury was deliberating a matter regarding which the appellants were the complaining party. Specifically, the matter being investigated by the grand jury was a complaint that police officers were having improper relations with female prisoners at the jail. The pertinent portions of the matter handed out are as follows:

> "The so-called authorities of Gainesville are at their old trick again. They have called together a grand-jury to investigate charges made by black people against that racist, klan-infested police department. Well, gather round, let me tell you this; that grand-jury is just as racist and klan infested as the police department is. I told you before that when they got through

lying, fixing, framing, and denying—nothing was going to be done! Look who's sitting on the jury. What they will probably do is put in a couple of Uncle Toms to make their findings justifiable. If there are any Uncle Toms on that grand-jury, we all know who they will be.

"By them housing female prisoners in the county jail is not going to solve the issues; just one of them. In the meantime that sadist Wilderson gets off scot-free. And Ted Duncan—I don't have to tell you about that Negro-hating hunkie, I think you already know. And Ex-Mayor McKinney— He's worse. A lying, no-good, racist if I ever saw one. He reminds me of 'Bull' Conner.

"There are people who are going to be subpoenaed to come to this fixed grand-jury, including myself. Many people are afraid to go—which shows WHITE POWER. WE ARE ASKING THAT EVERYONE IN GAINESVILLE WHO IS MAN AND WOMAN ENOUGH TO STAND UP AND FIGHT AGAINST THIS OPPRESSIVE CITY AND COUNTY GOVERNMENT COME FORWARD AND TESTIFY ON MONDAY, DECEMBER 18, at 9:30 A. M. By the way, where are those so-called Negro-leaders in Gainesville. You know these things have been going on, but you are afraid to stand up. So stay in your chairs, we know you are a part of white oppression."

In support of the Trial Judge's finding that appellants' actions were calculated and intended to interfere with the administration of justice and created a clear and present danger to the administration of justice, the order appealed recites that the statements distributed immediately adjacent to the room where the grand jury was deliberating

and in the corridor where witnesses were awaiting their turn to testify were of such nature that they could reasonably influence the testimony which might be given before the grand jury by the waiting witnesses. Moreover, the Trial Judge seemed to believe that the recitation in the mimeographed matter concerning the incidents under investigation reasonably could have a bolstering effect upon the uniformity of the witnesses' testimony as they appeared before the grand jury.

The Trial Judge further found that the appellants' reference to "Uncle Toms" in the above quoted excerpt from the circular constituted a veiled threat to those members of the grand jury who were of the Negro race. Our consideration of this racist tactic by appellants in the circumstances presented here would lead all but those with a myopic viewpoint to conclude, as did the Trial Judge, that if those members of the grand jury who were so crudely singled out did not vote out a presentment in accordance with the appellants' desire, the censure of the Negro community would be suffered by those daring to defy their dictate.

For reversal appellants contend that the activities admittedly engaged in by them come under the protective cover of the First and Fourteenth Amendments to the United States Constitution relating to freedom of speech and press as construed by the United States Supreme Court in Pennekamp v. State of Florida, 328 U. S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295; Craig v. Harney, 331 U. S. 367; and Wood v. Georgia, 370 U. S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569. Our examination of these cases fails to persuade us that they are controlling in the case at bar. As we state in our earlier consideration of the bail aspects of this case in Dawkins, supra, at page 694:

"It can readily be seen therefore that the case before us concerns itself not merely with criticism of a public official or body, but rather conduct calculated and tending to influence a grand jury and prospective witnesses awaiting their turn to testify under circumstances wherein there exists a clear and present danger that such influencing effect logically could result. Appellants' intent that their written utterances bring about grand jury action satisfactory to them is manifest not only in the rhetoric chosen, but by the place and manner of distributing them. On the record and arguments before us, this seems to be the basis of the trial judge's contempt order; not mere criticism of the kind found in Pennekamp and Wood, supra."

Efforts to influence a grand jury in its deliberations respecting specific matters under investigation by it are not shielded by the constitutional right of free speech. In Sloan v. Brown, 154 So. 514 (Fla.), our Supreme Court held that the appellant was properly held to be in contempt of court for approaching a member of the grand jury and asking him to "look out for him . . . in any matters to be investigated by the Grand Jury that might involve him. . . ." at page 514. We see no significant difference between oral and written communications directed to one or more members of a grand jury where such communication is made with the intent and purpose to influence the outcome of the grand jury's deliberations.

To determine the correctness of the Trial Judge's holding that the conduct here in question, occurring as it did in the immediacy of the grand jury's deliberations, had as its intent and purpose the influencing of that body's deliberations, we need only to examine the transcript of

testimony given by members of the grand jury pursuant to an order of the United States District Court for the Northern District of Florida in Tallahassee Civil Action No. 1384, which transcript was made a part of the record before us since the parties were the same in each case, and each case arose out of the same set of facts. Further, the cases essentially involved the same subject matter and the appellants herein made specific reference to this action in their collateral federal action, their counsel being the same in both actions. See Austin v. Mt. Zion Primitive Baptist Church of West Palm Beach, 165 So. 2d 412 (Fla. App. 2d 1964).

Examination of the transcript of the grand jurors' testimony convinces us, as it did the learned Federal District Judge, that the nature of the offense of which these appellants stand convicted is such as to create a real and present danger to the administration of justice. The transcript shows that the members of the grand jury actually came into possession of the mimeographed circular labeled "Black Voices." Testimony of some of the grand jurors was as follows:

> "Q. And when you read it, . . . what effect it had on you? A. . . . It startled me. . . .
>
> • • • • •
>
> "A. I was startled, because it intimidated me. I felt it was a threat to me as a Grand Juror when we had hardly even opened the session. It frightened me, frankly.
>
> Q. Can you elucidate . . . other reactions or impressions the publication had upon you? A. . . . the threat and intimidation that I got from this—throughout the entire session of the Grand Jury.

Q. . . . did you feel that the publication had any effect upon your ability to make an unbiased determination of the issues that were to be determined by you? A. Yes, sir, it did.

• • • • •

"A. It affected me. It affected the way in which I operated as a Grand Juror throughout the entire case. It affected the final presentment, as far as I was concerned, and the presentment which I voted for."

Another Grand Juror:

"Q. What effect, if any, did the reading of that instrument have upon you as a Grand Juror? A. It upset me when I first read it, and to feel like that here I was, . . .

• • • • •

"A. Well, first, they didn't know me, and yet they were accusing me first of being a liar and of being fixed; and they were intimidating the Jurors on the whole, especially the colored members of the Jury."

Another Grand Juror:

"Q. What effect did it have on you? A. Well, it was an insult to me, as well as a kind of veiled threat that if we did not find to suit them that they knew who we were and implied that things may happen."

The foregoing excerpts from the testimony of the grand jurors certainly are supportive of the Trial Judge's view that the appellants' conduct had as its purpose the interfering with the grand jury's deliberations. His judgment that appellants' conduct in the circumstances here pre-

sented was likely to interfere with and obstruct the process of a duly constituted grand jury then investigating both broad and specific matters relating to law enforcement in Alachua County, Florida, was certainly borne out by the testimony of the grand jurors.

Appellants' persistence that the matter before us is fraught with First Amendment considerations fails to impress us. We are not here confronted with the publication of thoughts and opinions about a matter of general public interest as was the case in Wood v. Georgia, supra, wherein the Supreme Court was concerned with a broad inquiry as to bloc voting and alleged corrupt election practices. There the circuit judges who had instructed the grand jury as to the object of its investigation was said by Sheriff Wood to have needlessly precipitated a political issue with racial overtones in the midst of an election campaign then in progress and in which Wood was a candidate. Wood first issued a statement to the newspapers from his office in the courthouse in which he criticized the judges' actions for instructing the grand jury as they did and further urged the citizens of the community to note that high judicial officers were in his opinion threatening political intimidation under the guise of law enforcement. The gravamen of the offense in Wood was the criticism of the judges who had instructed the grand jury. The trial court erroneously held that the mere publishing of the news release constituted the contempt by Wood, and that such publication of criticism of the judges constituted a clear and present danger to the administration of justice. No findings were made by the trial court in the Wood case. No reason was given there as to why the conduct complained of constituted a clear and present danger to the administration of justice.

In contrast, however, ample findings were made by the Trial Judge in the case at bar and sound reasons were stated for his conclusion that the conduct of the appellants posed a clear and present danger to the orderly administration of the grand jury function. Moreover, and quite fortuitously, the record before us as developed and expanded after appellants sought refuge in the federal court demonstrates quite clearly that the members of the grand jury were intimidated and their deliberations were influenced by appellants' efforts to bring about a result satisfactory to them.

We are not unacquainted with the wide latitude which has been accorded our citizenry to speak their minds under the protective cover of the First Amendment, and this is as it should be. No judicial officer should be permitted to resort to the power to hold one in contempt as a device by which to stifle criticism or fair comment on the manner in which his judicial labors are performed. As was held in Pennekamp v. Florida, 328 U. S. 331, the exercise of judicial power to punish for contempt within the context of First Amendment rights must be measured against a standard earlier described by the Supreme Court in Bridges v. California, 314 U. S. 252, as a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before an utterance, oral or written, may be punished.

We hold, when measured against the standard articulated by the highest court of the land, that the Trial Judge's finding that the conduct of appellants in the circumstances here presented was such as to seriously prevent the grand jury from discharging their duties free from interference by, and intimidating influences of appellants' efforts to affect the deliberations of the grand jury. The

evidence presented by the record before us does, in our opinion, furnish a rational basis for the Trial Judge's characterization of the appellants' conduct.

One cannot threaten, intimidate, bribe, or otherwise imminently seek to affect the outcome of grand or petit jury deliberations and then seek refuge in the First Amendment when held to account for his actions. One may well be critical of a judge or other public officer as was held in the Pennekamp, Craig, and Wood cases, supra, for:

> "... the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig v. Harney, 331 U. S. 367, 376.

Appellants' conduct in the instant case was not that of mere criticism. Its equivalence to jury tampering is no less so because resort was had to a publication in the form of a mimeographed circular rather than words spoken furtively to the individual jurors.

Affirmed.

RAWLS, Acting Chief Judge; and JOHNSON, J., concur.

Judgment and Sentence

MANDATE

From

District Court of Appeal of Florida

First District

To the Honorable, the Judges of the Circuit Court for the Eighth Judicial Circuit of Florida, Greetings:

Whereas, Lately in the Circuit Court of The Eighth Judicial Circuit for the County of Alachua in a cause therein styled:

Case No. 6880

State of Florida

vs.

Irven Lee Dawkins, also known as Jack Dawkins

Case No. 6881

State of Florida

vs.

Carol W. Thomas

---

the Order, Judgment and Sentence of said Court was rendered December 27, 1967, as appears by inspection of the pertinent record of the said Court in said Cause, which was brought into the District Court of Appeal of Florida,

First District, by virtue of proceedings agreeable to the laws of said State in such case made and provided;

AND WHEREAS, the said cause came on to be heard before the said District Court, in consideration whereof, on March 7, 1968, the said District Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof, therefore:

It is Ordered by the Court that the ..... do have and recover of and from the ..... costs in this behalf expended herein taxed at Twenty Five Dollars, and that all costs shall be taxed in the said lower court; and

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said Court, and the laws of the State of Florida, ought to be had, the said Order, Judgment and Sentence of said Circuit Court notwithstanding.

WITNESS, The Honorable DONALD K. CARROLL, Acting Chief Judge of said District Court and seal of said Court at Tallahassee, this 14th day of May, 1968.

RAYMOND E. RHODES
Raymond E. Rhodes
Clerk District Court of
Appeal of Florida

Order Dismissing Appeal

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

Monday, April 15, 1968

Case No. 37,234

IRVEN LEE DAWKINS, ETC., *et al.*,

Appellants,

VS.

STATE OF FLORIDA,

Appellee.

Upon consideration of motion to dismiss said motion is granted and it is ordered that the appeal be and the same is hereby dismissed.

A True Copy

Test:

SID J. WHITE
Sid J. White
Clerk Supreme Court.

CC: Honorable Raymond E. Rhodes
Honorable J. B. Carmichael
Honorable George R. Georgieff
Honorable Jerome J. Bornstein

Order Denying Certiorari

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

Tuesday, April 23, 1968

Case No. 37,227

District Court of Appeal, First District

IRVEN LEE DAWKINS, ETC., *et al.*,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Ceritorari be and the same is hereby denied.

A True Copy

Test:

SID J. WHITE
Sid J. White
Clerk Supreme Court.

cc: Honorable Raymond E. Rhodes
Honorable J. B. Carmichael
Honorable Jerome J. Bornstein
Honorable George R. Georgieff

PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1968

NO. [redacted] 164

IRVEN LEE DAWKINS and
CAROL W. THOMAS,

Petitioners,

—vs—

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

EARL FAIRCLOTH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondent.

TOPICAL INDEX

	Page
QUESTION PRESENTED	1-2
STATEMENT OF THE FACTS	2-5
ARGUMENT	6-12
CONCLUSION	12-13

TABLE OF CITATIONS
CASES

Bridges v. Calif., 314 U.S. 252, 86 L.ed. 192, 62 S.Ct. 190	4, 6, 7, 8, 9
Callendar et al. v. State, Fla., 181 So.2d 529	5
Craig v. Harney, 331 U.S. 367, 91 L.ed. 1546, 67 S.Ct. 1249	4, 6, 8, 9, 11
Dresner et al. v. Tallahassee, 375 U.S. 136, 11 L.ed.2d 208, 84 S.Ct. 235	5
Head v. Board of Examiners, 374 U.S. 424, note 12, 10 L.ed.2d 983, 85 S.Ct. 1759	12
Patterson v. Colo., 205 U.S. 454, 463	10
Pennekamp v. Fla., 328 U.S. 331, 90 L.ed. 1295, 66 S.Ct. 1029	4, 6, 7, 8, 9
Shelley v. Kraemer, 334 U.S. 1, 92 L.ed. 1161, 68 S.Ct. 836	12
Wood v. Ga., 370 U.S. 375, 8 L.ed.2d 569, 82 S.Ct. 1364	4, 6, 7, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1502

IRVEN LEE DAWKINS and
CAROL W. THOMAS,

Petitioners,

—vs—

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AND THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

WHETHER CONTEMPT CONVICTIONS OF PETITIONERS ARE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR THE PUBLICATION AND DISSEMINATION OF A CRUDELY MIMEOGRAPHED CIRCULAR IN AN AREA IMMEDIATELY ADJACENT TO THE ROOM IN WHICH THE THEN MEETING GRAND JURY OF ALACHUA COUNTY, FLORIDA, WAS BEING HELD AND WHICH CIRCULAR FOUND ITS WAY INTO

THE HANDS OF THE MEMBERS OF THE GRAND JURY AND WAS READ BY THEM CONSTITUTING INTIMIDATION OF THAT GRAND JURY AND EVIDENCING A CLEAR AND PRESENT DANGER THAT SAID CIRCULAR OBSTRUCTED, IMPEDED OR OTHERWISE INTERFERED WITH THE WORK OF THE GRAND JURY IN LIGHT OF THE ATTENDANT CIRCUMSTANCES REFLECTED BY THAT WHICH THE ENTIRE RECORD BELOW WOULD SHOW WERE IN EXISTENCE.

STATEMENT OF THE FACTS

As admitted by the petitioners, they initiated charges against the law enforcement authorities in the City of Gainesville, Florida (Petition, page 19). As a result of said charges the Alachua County Grand Jury was called into session for the purpose of investigating the charges and hearings were scheduled for December 18, 1967. The petitioners were subpoenaed to testify before the grand jury and were thus given the opportunity to present their views on the charges which they themselves initiated. This is apparent from the publication which they distributed. While the grand jury was in session or during a recess, four copies of the publication "Black Voices" were distributed by petitioners (see Answer of Petitioners filed in Circuit Court of Alachua County) to four persons in the hallway adjacent to the grand jury room.

Said publication in addition to accusing various officials of being "racist" and "[N]egro-hating hunkie[s]" stated the ". . . grand-jury is just as racist and Klan infested as the police department. . ." The article then concluded nothing would be

done because "what they will probably do is put in a couple of Uncle Toms to make their findings justifiable". The publication further accused the grand jury of being "fixed".

As a result of the petitioners' actions in distributing the referred to publication in the courthouse when the grand jury was in session, the state attorney filed an affidavit and petition for rule to show cause alleging petitioners were guilty of contempt of court in that the publication held the court and grand jury up to ridicule and ". . . impugned the impartiality of . . . the present grand jury. . ." (R 3-5). The petitioners filed answers admitting that they authored said publication and that they distributed it as set forth above. (R 15). No disclaimer of malicious intent was made.

On the basis of the affidavit and petition for rule to show cause, the stipulation and the answer, the trial judge found the petitioners guilty of contempt and imposed six and four month sentences on Jack Dawkins and Carol W. Thomas respectively. The trial judge entered a lengthy order and after noting that the question was whether the publication ". . . was calculated and intended to interfere with the administration of justice and created a clear and present danger . . ." thereto, made extensive findings. The trial judge found, the publication ". . . itself to be a calculated effort on the part of the respondent (petitioners herein) to interfere with the fair administration of justice, and this being so it would not be necessary to show that it did actually influence the grand jury in any report which may be made. . . ." He further found that inasmuch as the publication was distributed in the courthouse it was probable that said publication would come into the hands of a member of the grand jury, and that the probability of influence in this respect is to be condemned. As to the reference in the publication to Negro members of the grand

jury, the trial judge found these to be a "veiled threat". The court found the publication calculated to produce in the mind a purpose to refuse to accept or respect any report which the grand jury rendered and that it, ". . . under the circumstances, was calculated and intended to interfer with the administration of justice and did create a clear and present danger".

The First District Court of Appeal affirmed the contempt conviction in its written opinion filed March 7, 1968. A copy of said opinion appears in the petition at pages 29 through 37. The District Court was aware of the decisions of this Court in **Pennekamp v. Florida**, 328 U.S. 331, 90 L.ed. 1295; 66 S. Ct. 1029, **Craig v. Harney**, 331 U.S. 367, 91 L.ed. 1546, 67 S. Ct. 1249; and **Wood v. Georgia**, 370 U.S. 375, 8 L.ed.2d 569, 82 S. Ct. 1364, but their examination of those cases failed to persuade them that they were controlling in this case. The court viewed the actions as equivalent to jury tampering rather than criticism and held that, measured in light of standards articulated by this Court in **Bridges v. California**, 314 U.S. 252, 86 L.ed. 192, 62 S. Ct. 190, the evidence presented by the record before it furnished a ". . . rational basis for the trial judge's characterization of appellants' conduct. . . ."

The petitioners thereafter sought a direct appeal in the Florida Supreme Court which was dismissed for want of jurisdiction, and a petition for writ of certiorari to the District Court of Appeal, First District of Florida, which was denied for the same reason.

Without regard to whatever petitioners may have urged upon the Florida Supreme Court in their petition for writ of certiorari to the District Court of Appeal in and for the First

District of Florida, it is clear from the order of the Florida Supreme Court denying certiorari that the exclusive basis for the denial was a determination by the Florida Supreme Court that it lacked jurisdiction to grant the review requested.

The highest court of last resort in the State of Florida and indeed the only one qualified to determine not only its own jurisdiction but that of every other Florida court plainly and simply concluded that it had no jurisdiction in petitioners' case and as a natural consequence thereof, properly denied review by certiorari. In so doing, its action must be accepted as the final word in the matter by an authority no less compelling than this Court's own observation in **Dresner et al. v. Tallahassee,** 375 U.S. 136, 11 L.ed.2d 208, 84 S. Ct. 235.

In the **Dresner** case, supra, this very Court relied on the exclusive authority of the Florida Supreme Court to determine where jurisdiction lay and accepted its findings. Likewise in a series of proceedings, the net result of which was the final action of the Florida Supreme Court in the case of **Callendar et al. v. State,** Fla., 181 So.2d 529, this Court again acknowledged that the final word on jurisdiction in the State of Florida had to rest with the Florida Supreme Court. In that regard, it was certainly no departure from rules longstanding and respected by all courts when the jurisdiction of a sister court is involved. It does seem clear that the Florida Supreme Court properly and authoritatively denied certiorari because it found itself without jurisdiction to entertain the petition. In this regard its decision must be supreme. See **Dresner et al. v. Tallahassee,** supra, and **Callendar et al. v. State,** supra.

ARGUMENT

Respondent maintains that the instant case is clearly distinguishable from the cases relied upon by petitioners; that the actions of petitioners were not protected by the First Amendment; that there is sufficient legal evidence in the record (either admissions by petitioners or legitimate inference of fact drawn by the trial judge) to support the convictions, and that the writ should not be granted.

The petitioners insist that this Court's decisions in **Bridges, Pennekamp, Harney,** and **Wood,** supra, command reversal of the convictions herein. Respondent maintains they do not. Petitioners rely largely upon the decision rendered in **Wood v. Georgia,** supra, as they did in the District Court of Appeal, where they urged this case is "remarkably similar" to the facts in **Wood,** supra, and that case should be controlling. Respondent would suggest in reply, as it did below, that to consider them in such a fashion is to consider only their similarities with total disregard for their vast differences. Differences which are apparent after only a casual examination. A close inspection of this case and the **Wood** case, supra, will reveal that they are about as much alike as a Bengal tiger and a kitten.

The **Wood** case, supra, did not concern itself with ". . . misconduct aimed at influencing the outcome of a trial or a grand jury proceeding . . ." 370 U.S. at 580. In that case the Bibb County Superior Court Judge had instructed the grand jury to conduct an investigation into charges that candidates, Wood being one, for public office had purchased Negro bloc votes. Wood issued to the local press a written statement in which he ". . . criticized the judge's action . . .", 370 U.S. at 579, in calling for the investigation and the method em-

ployed by the judge in doing so. An open letter to the grand jury was given to the bailiff stationed outside their room, who made the letter available to the grand jury at Wood's request. Apparently Wood was not given the opportunity to appear before the grand jury as were petitioners here. Wood was allowed to file a statement of intent where he stated ". . . his purpose in issuing the statements was simply to inform the public of what he sincerely believed to be the other side of the issue created by the charge. . . ." The Georgia Court made no findings and gave no reasons for its actions in finding Wood guilty of contempt nor did the court recognize that it had to review the case in light of **Bridges**, supra, and **Pennekamp**, supra.

In the instant case the abusive language was not directed at the trial judge but at the **grand jury itself** before that body had concluded its deliberations and returned its report. In the case at bar alleged "criticisms" were made before the grand jury had done anything whereas in the **Wood** case, supra, the comments concerned actions already taken by the court. Here the petitioners, who demanded the investigation be conducted, were going to testify before the body whereas in **Wood**, supra, he apparently had to resort to the open letter to get his side before them. The petitioners never disclaimed any malicious intent whereas in the **Wood** case, supra, he did. 370 U.S. at 382. Furthermore, the text in the Wood publication is compatible with his statement of intent. The publication here rendered it impossible for petitioners to disclaim their true motive and purpose.

In the District Court of Appeal, First District, and here petitioners have insisted that their actions constituted "criticism" and that therefore they were protected by the First Amendment (petition, at page 21). Respondent is unable to

understand how petitioners can label their writing "criticism" when the grand jury had not yet concluded their hearings or rendered its decision, unless, of course, they realize that there is a legal difference between criticism and intimidation. Webster's Dictionary defines criticism as judging or evaluating. It is submitted that you cannot criticize something which is to take place in the future! Criticism, indeed, of whom and for what? Who had done anything or refrained from doing anything for or against them, theirs, or their cause? What could they "criticize"—surely not the fact that a grand jury had been called and was sitting to deliberate on the very complaint they made. Notwithstanding petitioners insistence that their publication was "criticism", respondent insists that it was exactly what the trial judge found it to be, to-wit: a calculated effort on the part of petitioners to interfere with the fair administration of justice and a "veiled threat" toward certain members of the grand jury, if indeed not the entire body.

The petitioners' reliance upon the decisions rendered in **Bridges**, supra, **Pennekamp**, supra, and **Harney**, supra, are likewise misplaced. In all of the aforementioned cases the attack was made upon a judge not a group of laymen. The constant theme of the decisions referred to is the view that:

> ". . . A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." 331 U.S. 376.

This view may very well be true, although it has been

questioned (see dissenting opinion by Frankfurter in **Bridges**, supra, and concurring opinion in **Pennekamp**, supra), however as noted by Justice Harlan in **Wood v. Georgia**, supra:

> "'It cannot be assumed with grand jurors, as it has been with judges, Craig v. Harney, supra, (331 U.S. at 376), that they are all "men of fortitude, able to thrive in a hardy climate". What may not seriously endanger are independent deliberations of a judge may well jeopardize those of a grand or petit jury.'" 370 U.S. at 587.

Petitioners erroneously choose to classify judges and grand jurrors in the same category (petition, page 21) when none of the opinions support such equality.

Additionally, in **Bridges**, supra, **Pennekamp**, supra, and **Harney**, supra, the comments alleged to have been contemptuous were published in newspapers as opposed to dissiminated in the presence of the grand jury. Furthermore, **Pennekamp**, supra, concerned action already taken by the trial judge and the effect of the editorial on a jury selected in the future was remote. 328 U.S. at 348. In **Harney**, supra, the court found no threat to the ability of the court to give a fair consideration to the motion for rehearing and the editorial was addressing itself to a trial which is public. Grand jury action is not public until its report is filed and then testimony before it is secret and may not be revealed unless authorized by the court. In **Bridges**, supra, over a strong dissent, the court reversed the contempt conviction because otherwise it would "impute to judges a lack of firmness, wisdom or honor. . ." 314 U.S. at 273. Also, the majority found the conclusion that the utterance tended to interfere with justice was exaggerated. Justice Black was of the opinion that the trial judge no doubt anticipated the reaction to his decision and in all likelihood

knew the position the newspaper would take and therefore the articles were mere "threatened future adverse criticism" 314 U.S. at 273. Were the Alachua County Grand Jurors to be expected to receive such "threatened future adverse criticism"? And is it not relevant that this group of laymen were performing their civic duty by command rather than choice, as is a judge?

The above must clearly demonstrate that this case is different from those previously decided by this Court and none of those mentioned are by any means controlling. In fact the language suggests to the contrary. In **Wood v. Georgia**, supra, the court recognized that courts have the right ". . . to conduct their business in an untrammeled way. . . and that courts necessarily possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions. . ." 370 U. S. at 576 (emphasis supplied). The court also recognized the importance of the grand jury to our judicial and political system. 370 U.S. at 580. It must be informed, and cannot "operate in a vacuum" but certainly it should be free from "criticism" until after it has acted or has done something to deserve criticism. Surely when the grand jury was finished and reported its findings it became subject to the same criticism as courts or people, but ". . . the propriety and necessity of preventing interference with the course of justice by **premature** statement, argument or intimidation hardly can be denied. . ." **Patterson v. Colorado**, 205 U.S. 454, 463.

When the grand jury is conducting an investigation into charges such as were involved in the instant case they should not be "torn from their moorings of impartiality by the undertow of extraneous influence" 328 U.S. 366. Why should the Alachua County Grand Jurors be ". . . 'embarrassed' by hav-

ing matters put into their minds, the effect of which it is impossible to estimate or assess? Of course, there is a public interest in the function and action of the grand jury but the legitimate interest precludes . . . dissimination of matters . . . intended to influence proceedings or inevitably calculated to disturb the course of justice." 328 U.S. 361.

Respondent cannot help but wonder whether this Court would allow the dissimination of like publications immediately adjacent to its conference room while it was considering or deliberating cases pending before it? Should not a grand jury be given the same consideration when deliberating matters properly before it? Clearly all sides should be heard on such matters—indeed the petitioners themselves were heard by the grand jury (see publication)—but when all have had their say, then it is time for deliberation in an atmosphere conducive to impartiality. To have it otherwise would destroy public confidence in our judicial institutions.

At page 15, petitioners suggest they were not guilty of contempt because their effort to intimidate or influence the grand jury was unsuccessful for they note "the publication did not deter the Grand Jury from concluding, in its presentment, that the charges being investigated were not substantiated". Respondent submits this is an example of petitioners' twisted logic. As Justice Jackson pointed out in Craig v. Harney, supra, ". . . The fact that he [the judge] did not yield to it does not prove that the attack was not an effective interferenee with the administration of justice" 331 U.S. 395.

The petitioners attempt to obtain a reversal of their convictions by claiming that due process was violated because they were charged with one crime and convicted of another. Respondent points out that petitioners were charged with in-

pugning the impartiality of the court and the grand jury, which is sufficient to include a charge that they interfered with the administration thereof. In any event, this is the first time these petitioners have made this claim. They did not raise it in the District Court of Appeal, First District. They are therefore precluded from raising the matter here. **Head v. Board of Examiners**, 374 U.S. 424, note 12; 19 L.ed. 2d 983, 83 S. Ct. 175. **Shelly v. Kramer**, 334 U.S. 1, 92 L.ed. 1161, 68 S. Ct. 836.

Petitioners also claim they were denied due process because the District Court of Appeal allowed the record to be supplemented. This was introduced merely to demonstrate that the trial judge's findings and inferences drawn from the stipulated facts were both logical and legally justified. The District Court used them as such. In any event, this was not before the trial judge when he made his findings and ignoring this testimony, the remaining evidence is sufficient.

CONCLUSION

It is not the "verbal 'overkill'" employed by petitioners which prompted the contempt proceedings, nor was it "white racism" as petitioners imply.[1] It is not what they said, although

[1] The President's Commission on Civil Disorders did conclude that "[w]hite racism" and "[r]ace prejudice . . . threatens to affect our future" and was a major cause of urban riots; however, that Commission also noted that ". . . protest groups engaging in civil disobedience who turn their backs on nonviolence, go beyond the constitutionally protected rights of petition and free assembly, and resort to violence to attempt to compel alteration of laws and policies with which they disagree", was a contributing factor thereof. The Commission found that in the spring and summer of 1967, "[m]ilitant organizations, local and national, and individual agitators, . . . sought to encourage violence, and that they helped to create an atmosphere that contributed to the outbreak of disorder. . . ." Advanced copy of Report of the National Advisory Commission on Civil Disorder, 1968, page 9.

that was relevant, it was **where** they distributed their "criticism" and **when** they distributed their "criticism" that brought the corrective power of the court to bear. In finding the petitioners guilty of contempt hopefully these petitioners have been taught that ". . . freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise." 328 U.S. at 356.

For the reasons herein expressed the writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondent

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District, and the Supreme Court of Florida to petitioners' counsel, the Honorable Murray A. Gordon, 401 Broadway, New York, New York, and the Honorable Jerome J. Bornstein, 125 S. Court Avenue, Orlando, Florida, by mail, this_____ day of July, 1968.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent